

THE PUBLIC FACE OF PRIVATE INTERNATIONAL LAW: PROSPECTS FOR A CONVENTION ON FOREIGN STATE IMMUNITY

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I

INTRODUCTION

What is international law? Some people assume that the field is concerned largely with questions of foreign law that arise in transnational commercial transactions. Others suppose that it involves matters of high politics, perhaps considering whether U.S. or European intervention in Bosnia would be lawful. Either assumption, of course, is perfectly reasonable. Taken together, they epitomize two fields often referred to as “private” and “public” international law.

Not all aspects of international law are so easily categorized. In particular, the doctrine of foreign state immunity sits on a fence. It is largely applied by national judges to disputes involving, on one side, a private party. At the same time, the doctrine is imbued with ideas and principles that governments hold especially sacred— notions like sovereignty, equality, and noninterference in internal affairs. These two faces of the doctrine make it a challenging one for policymakers, practicing lawyers, judges, and academics.

The public dimension of foreign state immunity also distinguishes it from other problems that the Hague Conference has tackled over its history. This distinction need not suggest, however, that the topic is beyond the purview of the Hague Conference. To the contrary, the Hague Conference’s impressive track record in addressing complex matters of transnational litigation might position it to make a singular contribution to overcoming some of the problems that both private parties and foreign states face in litigation against foreign states.

This article considers the prospects for a convention on foreign state immunity. It focuses on whether such a convention should be supported by the United States. Two reasons exist for tying the discussion to U.S. interests. First, a focus on a particular set of interests, which are largely shared by other

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industrialized countries, will help to sharpen the discussion. Second, definition of "U.S. interests" is itself a challenge. A U.S. citizen seeking to sue a foreign government for alleged torture¹ may perceive little commonality between his or her interests and the interest of the U.S. Navy in avoiding suits about its base operations.² To develop a U.S. position about a convention, however, a decisionmaker must understand and reconcile these two sets of interests.³

In evaluating the prospects for a convention on foreign state immunity, initial considerations are the existence of both the *demand* for a new regime and the *supply* of possible regimes. Thus, this article begins with an overview of the weaknesses of the present situation, in which U.S. law is governed by the Foreign Sovereign Immunities Act ("FSIA")⁴ and the law of most other countries is found in their domestic law, sometimes in statutes⁵ and other times in case law.⁶ The article then considers what kind of convention would best address these problems.

1. See, e.g., *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), *rev'd*, 113 S. Ct. 1471 (1993). The plaintiff alleges that he was detained and tortured by Saudi agents while employed in Saudi Arabia as an engineer. The Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2892 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1391(b), 1602-1611 (1988)), denies immunity for certain noncommercial torts, 28 U.S.C. § 1605(a)(5) (1988), but only if they occur in the United States. In *Nelson*, the Eleventh Circuit held that Nelson's recruitment and hiring in the United States constituted a "commercial activity," and that causes of action for injuries sustained during his alleged detention and torture were "based on" that commercial activity because they allegedly occurred in retaliation for his reporting safety violations at the hospital where he was employed. *Nelson*, 923 F.2d at 1533-35.

2. See *In re Canada Labour Code*, [1992] 2 S.C.R. 3 (Fed. Ct. Aug. 9, 1989), *rev'd sub nom.* *United States v. Public Serv. Alliance of Can.*, No 21,641 (Can.) (May 21, 1992) (Canada's Supreme Court dismissed case in which union sought to enforce administrative order requiring U.S. Navy to permit a representation election at U.S. Navy base) (on file with author).

3. The substantive merits of a proposed agreement are not the only issue that a government must weigh in deciding whether to enter into a particular negotiation. Other factors (for example, broader political agendas or the perception that a negotiation is unavoidable) may dominate and may even moot the question whether negotiation of a particular agreement is in a government's interest.

4. United States Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2892 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1391(b), 1602-1611 (1988)). Congress enacted the FSIA primarily to shift immunity determinations from the Executive Branch to the courts and to codify the restrictive theory of foreign state immunity. Under the Act, foreign states are immune unless one of eight exceptions apply. Six of these exceptions are embodied in § 1605(a) and include cases that involve: (1) a state that has waived immunity; (2) an action based on a "commercial activity" with a specified nexus to the United States; (3) rights in property taken in violation of international law; (4) rights in immovable property located in the United States or property located in the United States acquired by gift or succession; (5) certain "noncommercial torts"; or (6) enforcement or confirmation of arbitral awards.

5. See, e.g., State Immunity Act, 1978, ch. 33 (U.K.), *reprinted in* 17 I.L.M. 1123 (1978) [hereinafter U.K. Immunity Act]; State Immunity Act, 1979 (Sing.) (codified at SING. REV. STAT., 1979 Supp. at 193), *reprinted in* GAMAL M. BADR, STATE IMMUNITY (1984) [hereinafter Singapore Immunity Act]; Canadian State Immunity Act, 1982 (Can.) (codified at R.S.C. ch. S-18 (1985) (Can.)), *reprinted in* 21 I.L.M. 798 (1982) [hereinafter Canadian Immunity Act]; Foreign State Immunities Act, 1985, No. 196 (Austl.), *reprinted in* 25 I.L.M. 715 (1986) [hereinafter Australian Immunity Act]; Foreign States Immunities Act, 1981 (S. Afr.) (codified as amended at 5 JUTA'S STAT. S. AFRICA 1-428 (1991)) [hereinafter South African Immunity Act]; see also Pakistani State Immunity Ordinance, 1981, *reprinted in* BADR, *supra*; European Convention on State Immunity, May 16, 1972, 11 I.L.M. 470 (1972).

6. The case law of foreign state immunity is reviewed in Ian Sinclair, *The Law of Sovereign Immunity. Recent Developments*, 1980-II RECUEIL DES COURS 113; Singapore Immunity Act, *supra* note 5.

II

PROBLEMS IN EXISTING LAW

In determining what we want from foreign state immunity law, be it conventional or statutory, it is useful to recall why the United States moved to the restrictive theory of foreign state immunity in 1952.⁷ It did so because the doctrine seemed the best accommodation of three competing U.S. interests: (1) the interest in applying normal market mechanisms, including lawsuits, to commercial relationships between U.S. private parties and foreign states; (2) the reciprocity interest of the U.S. Government, that is, its interest in advancing immunity rules to bar suits that would interfere with its functions; and (3) the U.S. interest in avoiding foreign policy problems that arise if foreign governments perceive that U.S. exercise of jurisdiction goes beyond that permitted under international law.⁸ Thus, one way to evaluate a substantive provision of foreign state immunity law is to ask whether it strikes the right balance among these interests. This evaluation requires a decision whether, for example, the interest in allowing a suit for trade libel against a foreign government is more or less important than the interest in avoiding libel suits against the U.S. Government and the interest in avoiding foreign policy problems that might result if U.S. courts exercised jurisdiction in such cases.⁹ Once a policy preference is established, the law should also state clear and predictable rules. In structuring a transaction, both private parties and governments should be able to ascertain whether the foreign state will be immune. Clear and predictable rules may also alleviate governments' concerns about infringement on sovereignty, either by increasing their sense that their concerns are addressed or by enabling them to avoid situations in which they cannot expect immunity.¹⁰ Finally, immunity law should enjoy international acceptability.¹¹ Foreign

7. In the 1952 "Tate letter," the State Department adopted the restrictive theory of foreign state immunity, noting that "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." Letter from Jack Tate, Acting Legal Adviser to the Secretary of State, to Acting Attorney General Philip Perlman (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952).

8. *Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964) (recognizing that the U.S. government, through the restrictive theory, was attempting to accommodate both the interests of individuals doing business with foreign governments with the interest of foreign governments in being free to perform certain "political acts" without having to defend the propriety of such acts before foreign courts), *cert. denied*, 381 U.S. 934 (1965). Like the State Department in the Tate letter, the court in *Victory Transport* largely equates the restrictive theory with the commercial activity exception. This shorthand is widespread, *see* Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489, 490 n.4 (1992), and compounds the difficulty of treating the commercial activity exception and the tort exception as parts of a unified doctrine. *See infra* discussion in text following note 23.

9. *See, e.g.,* *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989).

10. Legal rules are sometimes left imprecise because the drafters, be they members of Congress, treaty negotiators, or parties to a contract, could not agree on more precise language. Other times, imprecision reflects the difficulty of framing a rule that governs unanticipated categories of cases. The FSIA's vague commercial activity exception appears to stem largely from such uncertainty. *See, e.g.,*

government perceptions of immunity rules are shaped not only by the substantive provisions, but also by the accompanying procedures, including provisions on service of process, means of asserting immunity, and resort to default judgments.¹²

Before turning to an examination of how the present situation measures up against these standards,¹³ it is important to recall that the FSIA was the first national codification of foreign state immunity law and has been a model for other countries. This discussion emphasizes the Act's flaws, but is not intended to suggest that the entire Act be discarded. Moreover, problems with the existing statute should not, taken alone, lead us to endorse a convention. Rather, if those problems can be addressed by amending existing U.S. law or through other means, a convention may be unnecessary or ill-advised.

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94th Cong., 2d Sess. 27 (1976) [hereinafter Hearings] (testimony of Monroe Leigh, Department of State Legal Adviser) (in light of difficulty of drafting legislation delineating demarcation between commercial and governmental activity, decided to "put . . . faith in U.S. courts"). Such imprecision undermines the advantages of codifying the law of foreign state immunity. Retrospectively, of course, a party to a dispute may prefer an imprecise rule to one that clearly bars its claim. Prospectively, however, imprecision disserves both private and government interests in predictability.

11. When evaluating a domestic statute, international acceptability can be assessed by measuring the statute against an international law standard. In appraising the international acceptability of a potential convention, the question is not international law consistency, but whether a potential convention will attract the parties necessary to make it successful.

12. Perceptions of internationally negotiated rules may also depend on perceptions of the process in which they were developed. *See generally* THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) (stating that legitimacy of international rules, which increases their pull towards compliance, depends in part on the pedigree of such rules). If a broadly accepted convention on foreign state immunity is desirable, therefore, it would be important for the Hague Conference or other sponsoring institution to structure an open and representative negotiating process.

13. This discussion focuses on problems in U.S. law, which has direct implications for U.S. private parties seeking to sue foreign states and has reciprocity implications and foreign policy implications for the U.S. government. A more complete consideration of this question would require closer examination of the United States's experience as a defendant in foreign states. Inadequacies of the substantive provisions of foreign law, however, may pose only infrequent practical problems for the United States. Given the extent to which the FSIA limits immunity, it is unlikely that the United States often finds itself as a defendant in a case in which the foreign state's laws deny immunity but the FSIA grants immunity. Moreover, even when foreign law affords *more* immunity to the U.S. Government than the FSIA affords to foreign governments, longstanding U.S. practice is to assert immunity only if the activity would be immune under the FSIA. *Hearings, supra* note 10, at 32 (testimony of Bruno Ristau, U.S. Department of Justice). Procedural complexities and inconsistencies, however, undoubtedly affect the United States when it is named as a defendant in foreign courts.

A. Substantive Problems: Immunity and Minimum Contacts

The two most important exceptions to immunity are the commercial activity exception¹⁴ and the tort exception.¹⁵ As such, it is important to determine if, and how, they could be improved.

I have argued elsewhere¹⁶ that the commercial activity exception is inadequate because it is premised on a meaningless nature-purpose distinction and because the proxy for the nature-purpose distinction used by most courts—whether the activity is one in which a private person can engage—effectively offers the courts no guidance. Beginning in the mid-1980s, lower courts began to rebel against the statute's requirement that they consider nature, but not purpose.¹⁷ The recent Supreme Court decision in *Republic of Argentina v. Weltover*¹⁸ put an end to this circumvention of the statutory language, but did nothing to overcome the pressures that had led courts to resist applying the statute.

One way to overcome the inadequacies of the nature-purpose test is to abandon it and to revise the commercial activity exception along the lines of the Australian State Immunities Act, the most recent and best developed offspring of the 1978 State Immunity Act of the United Kingdom.¹⁹ Instead of relying

14. 28 U.S.C. § 1605(a) (2) (1988):

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the State in any case—

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

15. 28 U.S.C. § 1605(a) (5) (1988):

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the State in any case—

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

16. Donoghue, *supra* note 8.

17. *Id.* at 499-517.

18. 112 S. Ct. 2160 (1992) (holding that Argentina and Argentine Central Bank were not immune from suit seeking to compel bank to honor obligations that it had unilaterally rescheduled).

19. Like the FSIA, the Australian statute, *supra* note 5, delineates exceptions to foreign state immunity. But instead of using the nature-purpose distinction which is central to the FSIA, the Australian Immunity Act, like the 1978 U.K. State Immunity Act, *supra* note 5, specifically enumerates exceptions to immunity, including contracts of employment, bankruptcy proceedings, intellectual property, membership in corporations and similar associations, bills of exchange, taxes, and commercial transactions. The Australian statute describes a commercial transaction as

a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged [including] (a) a contract for the supply of goods or services; (b) an agreement for a loan or some other

on the nature-purpose distinction, the Australian statute contains a more detailed list of situations in which immunity should be denied. These enumerated exceptions permit a legislature to craft more precise immunity rules and, thus, to increase the clarity and predictability of foreign state immunity law. Enumerated exceptions like those found in the Australian statute could also be incorporated in a convention.²⁰

The definition of commercial activity is not the only aspect of the commercial activity exception that has been criticized. The Act's three separate tests for minimum contacts have also led to considerable confusion.²¹ As with the definition of commercial activity, the most obvious solution is to amend the statute itself. One option is to eliminate the special nexus requirements that apply to foreign governments.²² Another option is to clarify the existing provisions to reflect the apparent congressional intent to apply different, and more stringent, minimum contacts standards to foreign states. The choice between these options is less stark if the commercial activity exception is changed from the present single exception to enumerated exceptions, because the enumerated exceptions can, as in foreign statutes, contain their own individualized rules defining their territorial scope.²³

Turning from the commercial activity exception to the tort exception, at first blush, appears to move from one sort of private conduct to another, for example, from business dealings to torts incidental to governmental activity,

transaction for or in respect of the provision of finance; and (c) a guarantee or indemnity in respect of a financial obligation, but does not include a contract of employment or a bill of exchange.

Australian Immunity Act, *supra* note 5, § 11(3). Compare with 28 U.S.C. § 1605(a) (2). For a careful discussion of the law of foreign state immunity, including comparisons of existing statutes, see AUSTRALIAN LAW REFORM COMMISSION, REP. NO. 24, FOREIGN STATE IMMUNITY (1984) [hereinafter LAW REFORM COMM'N REPORT].

20. Indeed, the International Law Commission draft articles include such enumerated exceptions. See *infra* note 23.

21. 28 U.S.C. § 1605(a)(2). See text quoted *supra* note 14. See generally JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS §§ 3.8-3.10 (1988); Peter Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 1986-V RECUEIL DES COURS 235, 335-51; Carlos M. Vázquez, *The Relationship between the FSIA's Commercial-Activities Exception and the Due Process Clause*, 85 PROC. AM. SOC. INT'L L. 257, 259 (1991).

22. Unless a revised statute specified that the personal jurisdiction rules that apply to private entities also apply to foreign states, this change could increase the uncertainty of decisions under the FSIA. In *Republic of Argentina v. Weltover*, 112 S. Ct. 2160 (1992), the Supreme Court declined to decide whether foreign states are "persons" for purposes of the Due Process Clause of the Fifth Amendment. *Id.* at 2169.

23. Foreign statutes and the International Law Commission's draft articles do not prescribe generally applicable minimum contacts standards for actions against governments. See U.K. Immunity Act, *supra* note 5; Singapore Immunity Act, *supra* note 5; Canadian Immunity Act, *supra* note 5; Australian Immunity Act, *supra* note 5; South African Immunity Act, *supra* note 5; *Draft Articles on Jurisdictional Immunities of States and Their Property: Report of the International Law Commission to the General Assembly*, U.N. GAOR, 46th Sess., Supp. No. 10, U.N. Doc. A/46/10 (1991) [hereinafter 1991 ILC Rep.]. The enumerated exceptions of these statutes, however, include some special nexus requirements tailored to the exceptions. See, e.g., Australian Immunity Act, *supra* note 5, § 12(1) (contracts of employment made or to be performed in Australia), § 15 (registration or protection of inventions or trademarks, or use of a trade name "in Australia"), § 16 (membership in bodies incorporated in Australia), § 20 (obligations imposed by Australian tax law).

such as automobile accidents. At some time, this may have been an accurate depiction of the two exceptions. At present, however, the commercial activity and tort exceptions have diverged. The crux of this difference is the way that invocations of "sovereignty" bear on the two exceptions. The commercial activity exception preserves immunity as necessary to protect a foreign state's "sovereignty." The contemporary tort exception, on the other hand, is available even when the foreign state's actions are quintessentially "sovereign," for example, when a foreign state assassinates an opponent.

Under present law, however, there is a price for the greater intrusiveness of the tort exception. In the United States and elsewhere, tort exceptions require a closer nexus to the territory of the forum state than do commercial activity exceptions. This territorial limitation fits with the most often-stated rationale for the tort exception, that "the foreign state has no privilege to commit local physical injury or property damage."²⁴ Nonetheless, the limitation has troubling consequences: a U.S. resident who fails to receive a wrench that she orders from a foreign state-owned company may be able to sue for damages; if the foreign government instead tortures her outside the United States, she may not bring suit in the United States.²⁵ This dichotomy starkly illuminates the challenges of defining the United States's interest in a particular immunity rule. On the one hand, the United States has an interest in affording a forum to residents who suffer at the hands of other governments, especially if the foreign government acts in violation of international law.²⁶ On the other hand, relaxation of the territorial requirement would expose the United States to suits abroad in connection, for example, with its military activities, and might lead to charges that U.S. law was inconsistent with international law.

Even if we limit ourselves to consideration of existing U.S. law, the tort exception raises two important questions: (1) the precise formulation of the provision's territorial scope, that is, whether it should apply to torts committed outside the territory of the forum state or to torts causing damage outside the foreign state; and (2) the kinds of torts covered by the exception, that is, whether the exception should cover not only loss or damage to tangible property and human life, but intangible losses such as those at issue in defamation actions or misrepresentation suits.

At present, the FSIA denies immunity for suits "in which money damages are sought . . . for personal injury or death, or damage to or loss of property, occurring in the United States and caused by [a] tortious act or omission of [the foreign state]."²⁷ Thus, the exception is limited to injuries occurring in the United States, but the statute does not state whether the wrongful act or

24. LAW REFORM COMM'N REPORT, *supra* note 19, at 67.

25. The prohibition against execution against foreign state property without a "nexus" to the cause of action compounds the disparity between the two exceptions.

26. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2368-71 (1991).

27. 28 U.S.C. § 1605(a)(5).

omission must also occur in the United States.²⁸ Other statutes take precisely the opposite tack, specifying that the wrongful act or omission must occur in the forum state, without requiring that the damage occur there.²⁹ This formulation is truer to the stated rationale for the territorial limit,³⁰ and it is worth considering whether U.S. law should be revised to conform to foreign statutes and to the congressional intention suggested by the legislative history.

As to the kinds of torts covered, the U.S. exception is limited to damages for "personal injury or death, or damage to or loss of property."³¹ In addition, the FSIA preserves immunity for claims based on the exercise of a "discretionary function"³² and for certain listed torts, including malicious prosecution, defamation, misrepresentation, and deceit.³³ These exclusions were engrafted onto the FSIA from the Federal Tort Claims Act ("FTCA").³⁴ Foreign statutes also limit the kinds of torts for which there is no immunity, but do so by limiting the tort exception to personal injury and damage to tangible property.³⁵ The motivation for the two formulations appears to be the same. The difference in structure, however, makes U.S. law less accessible to foreign interests and, therefore, undermines both the international acceptability and predictability of U.S. law. Recently, for example, the Supreme Court rejected lower court interpretations of the "discretionary function" exception of the FTCA.³⁶ Does this mean that the FSIA has also changed, or that the two standards have now diverged? And can foreign states reasonably be expected to know the answer to this question?

One additional provision of the FSIA has been controversial. The FSIA's exceptions for immunity from execution are more limited than the exceptions for immunity from adjudication.³⁷ The statute generally permits execution

28. Some courts, however, have suggested that the tort itself must also occur in the United States. See *Olsen by Sheldon v. Government of Mex.*, 729 F.2d 641, 645 (9th Cir.) (citing H.R. REP. NO. 1487, 94th Cong., 2d Sess. 21 (1976) ("[T]ortious act or omission must occur within the jurisdiction of the United States.")), *cert. denied sub nom. United Mexican States v. Olsen*, 469 U.S. 917 (1984); *In re Sedco, Inc.*, 543 F. Supp. 561, 567 (S.D. Tex. 1982) ("tort, in whole, must occur in the United States"), *vacated*, 610 F. Supp. 306 (S.D. Tex. 1984), *remanded on other grounds sub nom. Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co. (Pemex)*, 767 F.2d 1140 (5th Cir. 1985).

29. See, e.g., Australian Immunity Act, *supra* note 5, § 13; cf. Canadian Immunity Act, *supra* note 5, § 6 (follows formulation of U.S. statute). The ILC's draft articles take this latter approach, but also impose an additional requirement that the "author of the act or omission" be present in the territory of forum state when the act or omission occurs. 1991 ILC Rep., *supra* note 23, art. 12 at 102.

30. See *supra* note 24.

31. 28 U.S.C. § 1605(a)(5).

32. *Id.* § 1605(a)(5)(A).

33. *Id.* § 1605(a)(5)(B).

34. *Id.* §§ 1326(b), 2671-2680 (1993).

35. See 1991 ILC Rep., *supra* note 23, art. 12, at 102; LAW REFORM COMM'N REPORT, *supra* note 19, at 69.

36. See generally *United States v. Gaubert*, 499 U.S. 315 (1991).

37. 28 U.S.C. § 1610 (1988). Under § 1610(a), a foreign state's property in the United States used for commercial activity is subject to attachment in aid of execution only if the foreign state has explicitly or implicitly waived its immunity from attachment; the property was used for the commercial activity on which the claim is based; the property in question was taken, or has been exchanged for property taken, in violation of international law; the property was acquired by gift or succession; the property is immovable and is not the site of a diplomatic or consular mission; the property is the basis of an

against property of an agency or instrumentality of the foreign state engaged in commercial activity in the United States.³⁸ In the case of judgments against the foreign state itself, however, the statute only permits execution against property that "is or was used for the commercial activity upon which the claim is based."³⁹ This so-called "nexus requirement" gained notoriety in the *Letelier* case.⁴⁰ There, the survivors of Orlando Letelier and Ronni Moffitt alleged that the Government of Chile had assassinated the former Chilean ambassador and his associate in the United States. After obtaining a default judgment against the Government of Chile,⁴¹ they sought to execute the judgment against the Chilean airline.⁴² They failed largely because the Second Circuit declined to disregard the separate corporate form of the Chilean airline.⁴³

In the wake of the decision in *Letelier*, the FSIA has been described as a statute that provides a "right without a remedy."⁴⁴ Legislation to eliminate the nexus requirement has been introduced several times,⁴⁵ and has been supported by the American Bar Association but opposed by the Executive Branch.⁴⁶ Those who have sought elimination of the nexus requirement have pointed out that no comparable requirement exists in foreign statutes.⁴⁷ As with the debate over the territorial scope of the tort exception, this domestic debate would have to be resolved before the United States could settle on a negotiating position for a convention.

indemnification contract under a liability or casualty insurance policy which covers the claim which resulted in the judgment; or the judgment confirms an arbitral award and attachment would be consistent with the arbitral agreement.

Property in the United States owned by agencies and instrumentalities of a foreign state which are involved in a commercial activity is more easily attached. See *infra* note 38 and accompanying text.

38. 28 U.S.C. § 1610(b).

39. *Id.* at § 1610(a)(2).

40. *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *rev'g* 575 F. Supp. 1217 (S.D.N.Y. 1983) and 567 F. Supp. 1490 (S.D.N.Y. 1983), *cert. denied*, 471 U.S. 1125 (1985).

41. *Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980).

42. *Letelier*, 748 F.2d 790.

43. *Id.* at 793-95; see also *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623-33 (1983) (holding that although instrumentalities established as separate juridical entities should normally be treated as such, equitable considerations dictated that the separate form be disregarded where Cuban government was the real beneficiary of the Cuban bank's operations). In addition, the court in *Letelier* held that plaintiffs had not demonstrated that the airline was a joint tortfeasor with the government. *Letelier*, 748 F.2d at 797.

44. The *Letelier* court acknowledged that under the facts of the case, the plaintiffs were entitled to collect from the Chilean government but were unable to do so. "[U]nder the circumstances at issue in this case Congress did in fact create a right without a remedy." *Id.* at 798.

45. See, e.g., S. 1071, 99th Cong., 1st Sess. (1985); H.R. 1071, 99th Cong., 1st Sess. (1985).

46. See *Arbitral Awards: Hearing on H.R. 3106, 3137, H.R. 4342, and H.R. 4592 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 73, 77 (1986) (testimony and statement of Elizabeth G. Verville, Acting Legal Adviser, U.S. Department of State); Mark B. Feldman, *Amending the Foreign Sovereign Immunities Act: The ABA Position*, 20 INT'L LAW. 1289, 1290-91 (1986).

47. Feldman, *supra* note 47, at 1300-02.

B. Procedural Aspects of the FSIA

One important achievement of the FSIA was the elaboration of procedures for initiating suit against a foreign government other than the then-prevailing method of attachment of the foreign state's property. Unfortunately, these service of process provisions have proven extremely confusing, to the disservice of both private plaintiffs and foreign defendants. The statute⁴⁸ defines methods for serving foreign states, on the one hand, and agencies and instrumentalities on the other hand. For both sets of defendants, the statute defines a hierarchy. For service on foreign states, for example, the two preferred methods of service are service by special arrangement and service pursuant to a convention—that is, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.⁴⁹ If neither preferred method is available, the plaintiff may ask the clerk of the court to serve the defendant foreign ministry by registered mail.⁵⁰ If that fails, the plaintiff may transmit the papers to the State Department for service through diplomatic channels.⁵¹

These service provisions are bewildering to both plaintiffs and foreign states. Moreover, some foreign states object in particular to service of process by mail as an infringement on sovereignty.⁵² These provisions surely can be clarified and streamlined. It is worth considering, for example, whether the FSIA should retain service by mail on foreign ministries, a provision that provokes foreign governments but does little to improve the situation of plaintiffs.

These shortcomings in the substantive and procedural provisions of the FSIA raise the question of whether it would be preferable to change the status quo by amending the FSIA or through negotiation of a convention. Three areas of concern should be noted in consideration of the kinds of conventions that might be negotiated. First, would the negotiated substantive law be in the U.S. interest? The negotiated outcome, which depends largely on the composition of participating countries, might compound problems with U.S. law. Second, even if the United States is ready to modify its own law in a convention, other states might have less interest in doing so, especially those that are satisfied with the operation of their existing law. Finally, to assess the merits of a convention fully, we must go beyond doctrinal concerns to determine the magnitude of actual problems. For many commercial activities, for example, statutes and treaties are not the only sources of law. Increasingly, sophisticated parties address immunity in contracts and other agreements, thereby short-circuiting potentially contentious litigation. Such provisions may go a long way towards

48. 28 U.S.C. § 1608 (1988).

49. *Opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (entered into force Feb. 10, 1969).

50. 28 U.S.C. § 1608(a)(3).

51. *Id.* § 1608(a)(4).

52. *See* DELLAPENNA *supra* note 21, at 115-16 (countries objecting to service by mail on sovereignty grounds include Federal Republic of Germany, Switzerland, and France).

overcoming inadequacies in the existing commercial activity exception. Unfortunately, however, cases do continue to arise out of agreements that do not address immunity.⁵³ Perhaps more important, some cases addressed under the commercial activity exception do not arise out of agreements or consensual relationships, but involve commercial torts.⁵⁴ For such cases, as well as for noncommercial tort cases, the "no immunity" contract clause offers no solution.

III

ISSUES TO BE CONSIDERED RESPECTING A CONVENTION

Discussion of a convention must consider both what the convention should say and what the desired set of parties would be. In considering the prospects for a convention, two possible models emerge: the International Law Commission's ("ILC's") draft articles and the proposal for a "procedural convention" made by Peter Trooboff in his 1986 Hague lectures.⁵⁵ Three other instruments deserve brief mention: the 1991 resolution of the Institute of International Law,⁵⁶ the International Law Association's 1982 draft convention,⁵⁷ and the Organization of American States's ("OAS's") 1983 draft convention.⁵⁸

The articles approved by the Institute of International Law represent a very interesting attempt by the rapporteur, Professor Ian Brownlie, to recast foreign state immunity law as a set of competing criteria indicating, on the one hand, the competence of the forum state and, on the other hand, its incompetence. The effort unearths some of the doctrinal defects in present law and highlights the areas of intersection between the law of foreign state immunity and related doctrines, such as act of state and competence. Regrettably, however, its greatest strength, that it breaks free of traditional approaches to immunity law, also undermines its immediate utility as a model for a convention. In 1982, the International Law Association also contributed to the development of the law of foreign state immunity, producing a draft convention that undoubtedly influenced later developments, including the ILC articles. Finally, an expert

53. See, e.g., *Segni v. Commercial Office of Spain*, 835 F.2d 160 (7th Cir. 1987); *Tifa, Ltd. v. Republic of Ghana*, 692 F. Supp. 393 (D.N.J. 1988); *Practical Concepts, Inc. (PCI) v. Republic of Bol.*, 613 F. Supp. 863 (D.D.C.), *recons. denied*, 615 F. Supp. 92 (D.D.C. 1985), *vacated*, 811 F.2d 1543 (D.C. Cir. 1987); *MOL, Inc. v. People's Republic of Bangl.*, 572 F. Supp. 79 (D. Or. 1983), *aff'd*, 736 F.2d 1326 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984).

54. See, e.g., *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989); *In re Sedco, Inc.*, 543 F. Supp. 561 (S.D. Tex. 1982), *vacated*, 610 F. Supp. 306 (S.D. Tex. 1984), *remanded on other grounds sub nom. Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co. (Pemex)*, 767 F.2d 1140 (5th Cir. 1985).

55. Trooboff, *supra* note 21.

56. Institute of International Law, *Resolution on Contemporary Problems Concerning the Immunity of States Relation to Questions of Jurisdiction and Enforcement* (Sept. 2, 1991), in 1991 Y.B. SESSION OF BASEL (Inst. Int'l L.) 388-401.

57. International Law Association, *Draft Convention on State Immunity*, Sept. 9, 1982, 22 I.L.M. 287 (1983).

58. Organization of American States, *Inter-American Draft Convention on Jurisdictional Immunity of States*, Jan. 21, 1983, 22 I.L.M. 292 (1983) [hereinafter OAS draft convention].

group under the auspices of the OAS also prepared a draft convention on juridical immunities of states. That convention departs from U.S. approaches in many respects,⁵⁹ but stands as a telling reminder of the depth of the chasm between developed and developing countries with respect to this body of law.

A. Potential Conventions

1. *The International Law Commission's Draft Articles.* In 1991, the ILC completed its work on draft articles on the Jurisdictional Immunities of States and their Property and recommended to the General Assembly that it convene an international conference on the subject.⁶⁰

The ILC began to consider this topic in 1978 and much of its work was conducted under the cloud of the absolute immunity versus restrictive immunity debate. It is, therefore, a victory for the restrictive theory that the draft articles incorporate most of the exceptions to immunity found in the FSIA and in the law of other restrictive immunity states. Viewed from the standpoint of the United States's interests summarized earlier, however, the draft articles fall short in several important respects.⁶¹

A particularly troubling aspect of the draft articles is the definition of commercial activity. Under the articles, a court considering whether an activity is a "commercial transaction" should look

primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction.⁶²

The commentary explains that this formulation "is designed to provide an adequate safeguard for developing countries, especially in their endeavours to promote national economic development."⁶³ Thus, the commentary continues, if a defendant state can demonstrate that a contract or transaction has a "clearly public" purpose supported by "*raison d'Etat*," such as to relieve famine or to supply medicine to combat an epidemic, and that its practice is to "conclude contracts or transactions for such public ends," it is immune.⁶⁴

59. For example, the OAS draft convention, *supra* note 58, preserves immunity for noncommercial torts. Art. 6(e) (limiting tort exception to torts arising from trade or commercial activities). It denies immunity for "trade or commercial activities" only if they are undertaken in the forum state. *Id.* art. 5.

60. 1991 ILC Rep., *supra* note 23, at 10.

61. In some respects, however, the draft articles improve on U.S. law. They contain greater detail about the distinction between "commercial" and "immune" transactions. 1991 ILC Rep., *supra* note 23, arts. 2(1)(c), 10 (definition of "commercial transaction"); art. 11 (employment contracts); art. 14 (intellectual property); art. 15 (corporations and like associations). As noted earlier, many would also welcome the fact that the execution provisions do not require a nexus between the judgment and the property subject to execution. *Id.* art. 18 (permitting execution against property that is used or is intended for use by the foreign state for commercial purposes). Finally, the service provisions do not include service by mail. *Id.* art. 20.

62. *Id.* art. 2(2).

63. *Id.* at 30 (commentary).

64. *Id.*

These examples make clear that the so-called secondary purpose test would eviscerate the commercial activity exception. As Sir Hersch Lauterpacht noted over forty years ago, all governmental activities have an ultimate public purpose.⁶⁵ Moreover, a past practice of contracting to meet particular public ends would seem to weigh against immunity, not in favor of it.⁶⁶

The ILC's commentary notes that inclusion of the secondary purpose test was controversial.⁶⁷ The reasons for this controversy are important to our consideration of the prospects for a convention, because they illustrate some of the fundamental differences between developed and developing countries. In the not-too-distant past, the Soviet and Eastern European proponents of absolute immunity claimed "sovereignty" as the basis for the immunity, while the West invoked "fairness to plaintiffs" to justify restrictions on immunity. The emerging North-South debate also pits the private interests of individuals in developed countries against more public notions of "sovereignty." Upon closer scrutiny, however, this public-private distinction collapses. Restrictions on immunity, especially the commercial activity exception, do protect the interests of individual plaintiffs. More fundamentally, however, the restrictive theory, especially the commercial activity exception, is premised on a belief in the marketplace. Thus, a foreign state that wants to purchase medicine avails itself of the market when it bargains with vendors for the best terms available. Once the foreign state has taken advantage of the benefits of the marketplace, the restrictive theory holds that it should also shoulder the corresponding burdens, including the risk of litigation in a court that would otherwise have jurisdiction. A purpose test is at odds with these ideas, because it permits the foreign state to enter into the marketplace but to avoid its responsibilities if it can point to a "governmental" purpose for the transaction.

Just as fairness to individual plaintiffs has a public dimension, developing country efforts to preserve immunity have a private dimension. With or without a secondary purpose test, the parties to a transaction might include provisions on dispute settlement in the bargain. For example, they might call for arbitration and specify what law governs a dispute. If the draft articles simply provided that all contracts for the sale of goods were "commercial," the parties would know from the outset that there would be no immunity. However, if the applicable law instead includes a secondary purpose test, the private party would need to bargain for an express waiver of immunity or otherwise insulate itself from the assertion of immunity. For many consensual transactions, then, the practical effect of a secondary purpose test is to increase developing country

65. Hersch Lauterpacht, *The Problems of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 224 (1950). A purpose test almost always leads to a finding of immunity. *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 359 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

66. See CHRISTOPH H. SCHREUER, *STATE IMMUNITY: SOME RECENT DEVELOPMENTS* 42 (1988) (stating that use of "commercial" forms and methods indicative of commercial activity).

67. 1991 ILC Rep., *supra* note 23, at 30 (commentary).

bargaining power, much like requirements that potential investors include local partners. Therefore, it adds to the private party's cost of doing business.

The debate about the residual purpose test, then, is partly about the relative bargaining powers of developed country enterprises and developing countries. In attempting to take stock of U.S. interests, this aspect of the debate may deserve greater prominence than the questions of sovereignty and fairness that usually occupy the field. It is useful to consider how much bargaining power shifts as a result of a secondary purpose test and how any potential shift compares to other potential benefits of a convention on foreign state immunity. In the above-mentioned case of a developing country's effort to purchase a drug, for example, the practical effect of the shift might be slight if intellectual property laws made the vendor the sole source of product. This illustration suggests the importance of gathering additional data about the nature and the frequency of the problems encountered by U.S. interests in dealings with foreign states.

It is more difficult to assess the effects of a residual purpose test on commercial tort actions in which the parties have not entered into a consensual transaction. In the *Sedco* case, for example, an exploratory well being drilled by Mexico's state-owned oil company, Pemex, in the Gulf of Mexico exploded and caused substantial damage in the United States.⁶⁸ The plaintiffs alleged that the drilling was a commercial activity. Pemex, however, persuaded a district court that it had undertaken the drilling to ascertain the extent of Mexico's natural resources, a function that was "uniquely sovereign."⁶⁹ This result has been widely criticized, and the district court retreated from it in a subsequent holding. An auxiliary purpose test would give Mexico a much larger opening to show that the activity was "sovereign."

As with consensual transactions, a residual purpose test would shift immunity law towards foreign governments. Other problems exist with the test. As framed by the Commission's commentary, it amounts to a "nature" test for the North and a "purpose" test for the South. By contrast, the status quo is facially neutral. The FSIA and other developed country statutes do not draw distinctions among foreign state defendants, although their provisions may in fact have disparate effects on different groups of countries. Moreover, the bulk of state practice is reflected in developed country law, bolstering (or perhaps even bootstrapping) developed country contentions that their domestic law and practice are consistent with international law.

Apart from the definition of commercial activity, the ILC's commercial transaction exception differs from the FSIA in another important respect. The ILC's draft does not prescribe special jurisdictional rules for actions against foreign states, relying instead on the applicable rules of the forum.⁷⁰ This

68. *In re Sedco, Inc.*, 543 F. Supp. 561 (S.D. Tex. 1982), *vacated*, 610 F. Supp. 306 (S.D. Tex. 1984), *remanded on other grounds sub nom. Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co. (Pemex)*, 767 F.2d 1140 (5th Cir. 1985).

69. *Id.* at 566.

70. 1991 ILC Report, *supra* note 23, at 70 (commentary).

approach is consistent with that used in foreign statutes, but does not diminish the importance of examining whether the predictability and international acceptability of the FSIA would be enhanced by revising the statute's existing exceptions.

The tort exception of the draft articles would change, or at least clarify, U.S. law in several respects. First, the ILC's exception applies only if the tort occurred in whole or in part in the forum state. Thus, the exception turns on the location of the tortious conduct and not the damage. Second, the ILC exception applies only if the "author" of the act or omission is located in the forum state. The Commission included this second condition to exclude transfrontier torts such as "export of explosives . . . or dangerous substances."⁷¹ Thus framed, the tort exception would not be available to plaintiffs in "transnational public law litigation" seeking to redress wrongs suffered outside the United States. Moreover, the required physical presence of an "author" is unclear. If an official of the foreign state is present in the forum state, is the author "present?" If Pemex did business in the United States, was the author in the United States in the *Sedco* case?

The procedural provisions of the ILC draft articles are thin gruel⁷² and are discussed in connection with the proposal for a procedural convention.

2. *A Procedural Convention on Actions Against Foreign States.* In 1986, Peter Trooboff outlined a proposal for a convention on the procedural aspects of foreign state immunity and suggested this as an appropriate project for the Hague Conference.⁷³ Though Peter undoubtedly will want to make his own comments about this proposal, review of some of the highlights is appropriate.

A procedural convention might include provisions on:

- (a) *Service of process.* Practice as to service on foreign states is not uniform, and the United States's resort to methods other than diplomatic channels has often led to disputes.⁷⁴ This is a fruitful area for work. Greater consistency and clarity would serve the interests of private parties, the interests of the United States as a defendant, and the interest in avoiding foreign policy problems with angry foreign states.
- (b) *Forms.* Mr. Trooboff has suggested that suits against foreign states might proceed more smoothly if there were common forms for such matters as notifying the foreign state that suit has been brought, notifying a court that the foreign state claims immunity, or notifying the foreign state of prospective or actual default judgment.⁷⁵ A form that is designed to enable a

71. *Id.* at 104 (commentary).

72. *Id.* art. 20 (service of process); art. 21 (default judgement); art. 22 ("privileges and immunities" during court proceedings).

73. Trooboff, *supra* note 21.

74. *See infra* discussion at notes 49-53 and accompanying text.

75. Trooboff, *supra* note 21.

foreign state to claim immunity without retaining local counsel is likely to be of particular interest to foreign states with experience as defendants under the FSIA. In some cases, the information contained on a well-designed form might clarify a case to such a point that a court is willing to dismiss it without requiring a formal motion to dismiss. Such a procedure might go some distance toward addressing the objection of foreign states that they are required to retain local counsel even to defend against cases that should clearly be dismissed on immunity grounds.

- (c) *Model waiver clauses.* Uniform language for waiver of immunity might decrease costly litigation about whether parties intended to waive immunity.
- (d) *Filing of foreign state "certificates."* Mr. Trooboff suggests several possible uses of foreign state certificates, including a certificate that it owns or possesses certain property, a designation of agents for service of process, or registration of generalized waivers of immunity. Anticipating the question, "why would such a waiver interest a foreign state?," Mr. Trooboff explains that state-traders might gain a competitive advantage (or, at least, might lose a competitive disadvantage) if their potential interlocutors knew in advance of a transaction that they would not claim immunity.

Many of Mr. Trooboff's suggestions focus on issues that have been sources of friction under the FSIA. It is difficult, if not impossible, to anticipate the basis for a foreign state's indignant reaction to a lawsuit in a U.S. court. It may believe that states are absolutely immune. It may believe that the Executive Branch, not the courts, should resolve the matter. The case may touch political sensitivities. The foreign state may object that the case has an insufficient connection to the United States. It may resent the high cost of retaining U.S. counsel, which is almost always essential, even if the foreign state has a well-founded belief that it is immune. It may fear a large judgment by a U.S. court. A procedural convention would do much to allay these concerns. In particular, agreed mechanisms for service of process might reduce the number of cases in which foreign states simply refuse to proceed in accordance with the FSIA, giving rise to default judgments, or requiring close involvement by the Executive Branch.⁷⁶

A procedural convention will only be successful if it attracts broad adherence. It is therefore promising that many of Mr. Trooboff's proposals can be structured not as zero-sum games that serve one set of interests while hurting another but rather as "win-win" proposals that address aspects of foreign state

76. Foreign state concerns about the operation of the FSIA are summarized by a Mexican foreign ministry attorney in Miguel Angel Gonzalez Felix, *The Foreign Sovereign Immunities Act: Fair Play for Foreign States and the Need for Some Procedural Improvements*, 8 HOUS. J. INT'L L. 1 (1985).

immunity law that have caused problems for both foreign state defendants and for private interests. In this connection, some of the procedural provisions of the ILC draft articles deserve further thought. For example, the ILC's default judgment provision permits the foreign state to move to set aside a default judgment within four months of entry of the judgment.⁷⁷ The ILC draft also prohibits the imposition of fines or penalties on the foreign state and provides that the state cannot be required to post bonds or other security during litigation.⁷⁸ Some may believe that such provisions are unduly solicitous of foreign states. They are illustrative, however, of the kinds of proposals that are likely to emerge in negotiation of a procedural convention.

B. Parties to a Convention

The successes of the Vienna Conventions on Diplomatic Immunity⁷⁹ and Consular Immunity⁸⁰ suggest the benefits of universally agreed-upon rules of foreign state immunity. I am not sanguine, however, about the prospects for such a universally acceptable convention in the foreseeable future. As suggested earlier, the former East-West debate about immunity is steadily being replaced by a North-South debate. The ILC's report and the Sixth Committee debates may only have scratched the surface of what could be a highly polarized and unproductive global discussion of immunity.

What about smaller groupings of countries? Initially, it might seem that there is an inverse relationship between the need for a convention and the prospects of agreeing on one. For example, there is a need to bring U.S. law and Latin American law closer together, but it seems unlikely, based on the ILC and OAS drafts, that these two groups would find much common ground. On the other hand, precisely because there is so much commonality between U.S. approaches to foreign state immunity and the approaches of the Western European countries, there is a good prospect of agreeing on a convention and a correspondingly low need for such an agreement. With a third group of countries, however, this inverse relationship does not hold true. The formerly communist countries of Central Europe and the former Soviet Union may see a convention on foreign state immunity as an opportunity to westernize their law and to abandon an artifact of the centrally planned economy. Western interests may also perceive a concomitant need for such a convention. In the short term, internationally agreed-upon immunity rules may be valuable to U.S. private parties interested in doing business with those states. Looking further ahead, a convention involving those states might help to strengthen their commitment to the restrictive immunity camp. At this point in history, we know that many of these governments are looking west for their legal and economic models. Over time, however, we may find that some or all of them

77. 1991 ILC Report, *supra* note 23, art. 21(3).

78. *Id.* art. 22.

79. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

80. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

will increasingly see their economic and political fates tied up with developing countries and not with the industrialized countries. A complete appraisal of the merits of an agreement involving these so-called "economies in transition" depends on a better understanding of trends in the law and practice of these countries and the frequency with which U.S. and other western individuals and companies enter into transactions in which questions of foreign state immunity might arise.

IV

CONCLUSION

The collapse of the Soviet Union and the movement of the former republics and the former Eastern European satellites towards market economies suggests an opportunity to move beyond the unproductive debate over absolute versus restrictive immunity. This article suggests, however, that the disagreements between industrialized countries and developing countries would be no less contentious than the former East-West polemics. Accordingly, U.S. interests are unlikely to be advanced by negotiation of a global convention based on the ILC's draft articles. A convention that involves a smaller group of countries including the former communist countries, however, might achieve some important objectives and might fit within the mandate of the UN Economic Commission for Europe or the Conference on Security and Cooperation in Europe. Moreover, a global procedural convention on actions against foreign states would be a worthwhile project and one that would be particularly appropriate for the Hague Conference.